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Supreme Court, U.S.
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# In The
# Supreme Court of the United States

John A. Begala, Steven W. Borchers,
Cynthia Edwards,
*Petitioners*,

v.

PNC Bank, Ohio, National Association,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether RICO plaintiffs are required to *plead* "continuity," "coordination," and "ongoing organization" when alleging an "association-in-fact" enterprise.

Whether a bank can unilaterally impose a finance charge on a loan customer's account for a transaction that the customer never authorized and then conceal that finance charge from the loan customer, all without violating the Truth-in-Lending Act.

Whether, under Rule 15(a) and Foman v. Davis, 371 U.S. 178 (1962), a district court may deny a plaintiff leave to amend his complaint merely because the motion seeking leave was not filed until after a Rule 12(b)(6) motion had been granted and a judgment of dismissal entered.

Whether, under the National Bank Act, a national bank may charge the interest rate that the relevant state's "most favored lender" is permitted to charge if the national bank (1) cannot satisfy the state's requirements regarding the type of transaction for which that interest rate may be charged, and (2) cannot satisfy the provisions of state law that are material to the determination of the interest rate that is permitted for the type of transaction involved.

## PARTIES TO THE PROCEEDING

### Petitioners

John A. Begala, Steven W. Borchers, Cynthia Edwards. Petitioners are individuals and have no corporate affiliations.

### Respondent

PNC Bank, Ohio, National Association

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in Case Nos. 98-3360 and 99-3652 is unreported and is reproduced at Appendix A, p. 1a. The decision of the Sixth Circuit denying the Petition for Rehearing *En Banc* in Case Nos. 98-3360 and 99-3652 is unreported and is reproduced at Appendix E, p. 57a. The decisions of the United States District Court for the Southern District of Ohio are unreported and are reproduced at Appendix B, p. 22a, Appendix C, p. 25a, and Appendix D, p. 28a, respectively.

## JURISDICTION

The judgment of the Sixth Circuit was entered on June 7, 2000. Petitioners (hereinafter "plaintiffs") filed a timely Petition for Rehearing *En Banc* on June 21, 2000. On August 25, 2000, the Sixth Circuit issued a decision denying a rehearing by the panel and denying a rehearing *en banc*. This Court has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Truth-in-Lending Act ("TILA") (15 U.S.C. § 1601 *et seq.*); the National Bank Act (12 U.S.C. §§ 85, 86); and the RICO statute (18 U.S.C. § 1962(c)).

## STATEMENT OF THE CASE

### A. Introduction

This proposed class action arose out of a series of "payment holiday" schemes carried out by PNC Bank, Ohio, N.A., its predecessor Central Trust Company, N.A. (collectively referred to as "PNC"), and others during the 1980s and 1990s, if not earlier. PNC induced tens of thousands of its loan customers to execute formal acceptances of what the Bank called "payment holidays" — one-month deferrals of installment (*i.e.*, monthly) loan payments, usually in exchange for a flat $60.00 extension fee - without disclosing the enormous finance charges they would inevitably incur as a direct result of the deferrals. Moreover, not all of the payment deferrals granted by PNC were even authorized by loan customers. Indeed, one such customer, plaintiff Steven Borchers, incurred an undisclosed extension fee of $100.79 and additional interest thereafter as a result of a payment holiday that the Bank unilaterally imposed on him without Borchers' knowledge or consent.

As part of the overall scheme, a web of persons and entities outside PNC - particularly automobile dealers, since most payment holidays affected car loans - facilitated collection of the fraudulent, undisclosed interest charges. Most loan customers who received payment holidays from PNC, whether with their authorization or, as in Borchers' case, without it, still do not realize that hidden interest charges were embedded within their final loan payoff amounts.

## B. Factual Background

PNC repeatedly failed to disclose to its loan customers the actual costs that the Bank knew the customers would incur as a result of payment holidays. Even more than that, over and over during the relevant period, PNC *affirmatively misled* its loan customers about the true costs and consequences of a payment holiday.[1] Then, PNC and other entities took

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[1] PNC did so in tens of thousands of payment holiday letters like the sample attached to the complaint, which was addressed "TO OUR VALUED LOAN CUSTOMERS," read, in pertinent part, as follows:

> PNC BANK WOULD LIKE TO HELP YOU ACCUMULATE SOME EXTRA CASH DURING THE VACATION SEASON BY GIVING YOU AN OPPORTUNITY TO POSTPONE ONE LOAN PAYMENT.
>
> HERE'S HOW IT WORKS. THE AUTHORIZATION FORM ATTACHED BELOW LISTS A LOAN EXTENSION FEE WHICH IS THE PAYMENT YOU MAKE NOW IN ORDER TO POSTPONE YOUR REGULAR PAYMENT. SIMPLY SIGN THE AUTHORIZATION AND FORWARD IT ALONG WITH YOUR EXTENSION FEE PAYMENT. YOUR LOAN TERM WILL AUTOMATICALLY BE EXTENDED BY THE ONE PAYMENT YOU'RE POSTPONING NOW.
>
> ***THAT'S ALL THERE IS TO IT.*** THIS OFFER IS GOOD UNTIL JULY 31, 1993 SO YOU CAN POSTPONE YOUR JUNE OR JULY PAYMENT.
>
> IF YOU'D LIKE TO TAKE ADVANTAGE OF THIS OFFER, HERE'S YOUR CHANCE. REMEMBER, JUST SIGN AND

actions that concealed those costs, applied those costs to final loan balances, and ultimately collected the costs, almost always without the knowledge of the customer.

Plaintiff Borchers responded positively to PNC's payment holiday offers at least four times, paying at least $240.00 in "EXTENSION FEES." As a result of these payment holidays, Borchers and his wife incurred interest charges in excess of what they had agreed to pay. PNC did not apprise Borchers of these charges until the end of his loan, long after he had accepted the payment holidays. In

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DETACH THE AUTHORIZATION PROVIDED BELOW AND RETURN IT WITH YOUR EXTENSION PAYMENT IN THE ENCLOSED ENVELOPE. WE MUST RECEIVE YOUR AUTHORIZATION AND EXTENSION PAYMENT PRIOR TO YOUR REGULAR PAYMENT DATE IN THE MONTH DURING WHICH YOU WISH TO POSTPONE A PAYMENT.

IF YOU HAVE ANY QUESTIONS REGARDING THIS OFFER PLEASE CALL 651-TALK.

SINCERELY,
CONSUMER FINANCE DIVISION

THIS IS YOUR AUTHORIZATION TO EXTEND MY INSTALLMENT LOAN # * * * ONE MONTH BEYOND THE PRESENT MATURITY. THE EXTENSION FEE IS * * *.

---

SIGN HERE AND RETURN WITH YOUR CHECK

(Emphasis added)

addition, on or about February 15, 1994, PNC gave Borchers a payment holiday for the month of February 1994 without the authorization, consent, or knowledge of Borchers or his wife. On this occasion, PNC charged Borchers' account an extension fee of $100.79 and additional interest, again without the authorization, consent, or knowledge of Borchers or his wife. PNC did not disclose this unauthorized extension fee and interest until the end of Borchers' loan, and only after he demanded an explanation why his payoff amount was so high.

Plaintiff Cynthia Edwards likewise responded positively to PNC's payment holiday offers multiple times. Each time, she paid the $60.00 extension fee and unknowingly incurred additional undisclosed interest beyond what she had agreed to pay.

Details of payment holidays accepted by other victims of PNC's scheme are also alleged with particularity in the class action complaint. Other victims received payment holiday solicitation letters from PNC during the relevant time period and responded positively. These victims included Joyce Warren, a PNC loan customer who received by mail from PNC (and accepted) payment holiday offers, such as one dated December 8, 1988, which misrepresented and failed to disclose the true cost and consequences of accepting payment holidays. The letter sent to Ms. Warren and other plaintiffs falsely suggested that accepting a payment holiday would "ease the burden" of the customers' debt, when in fact the Bank knew that accepting payment holidays would impose new and greater debt burdens on customers.

Plaintiffs' original loan agreements never mentioned anything about the payment holiday program, so the true cost and consequences of accepting a payment holiday could not have been gleaned from such an agreement. While payment

holiday letters mentioned that the customer would have to pay an "EXTENSION FEE," the amount of which was supposedly specified at the bottom of each such letter, the letter did not mention anything about the much greater finance charges that the Bank knew would inevitably result from a customer's acceptance of a payment holiday. In fact, the word "interest" does not appear anywhere in the text of the letter quoted above or the aforementioned variation received by Ms. Warren. Nor does the word "finance charge" appear anywhere in the text of these letters.

In fact, PNC went out of its way to convince customers that the Bank had fully disclosed all of the facts that customers needed to know in order to make an intelligent decision whether or not to accept the payment holidays being offered. This, the Bank did by using deceptive phrases like "HERE'S HOW IT WORKS" and "THAT'S ALL THERE IS TO IT," and by suggesting that accepting a payment holiday would "EASE THE BURDEN" of the customers' debt. Unbeknownst to PNC's customers, the "EXTENSION FEE" that was mentioned in the letter was not really "ALL THERE IS TO IT," PNC's letters did not accurately explain "HOW IT WORKS," and accepting payment holidays would not "EASE THE BURDEN" but rather would impose new and greater debt burdens on customers who accepted them. By using such phrases in the solicitation letters, PNC falsely suggested to its loan customers that the "EXTENSION FEE" which they would have to enclose when they returned the "EXTENSION AUTHORIZATION" was the only cost they would incur as a result of accepting the payment holiday and that there were no other consequences which customers should consider before accepting. Approximately thirty percent (30%) of PNC's loan customers accepted payment holidays offered through deceptive solicitation letters. Also by means of the United States mail and interstate wire

facilities, PNC intentionally made false representations by granting *unauthorized* payment holidays to Borchers and by charging him an undisclosed and unauthorized extension fee and interest. PNC thereby fraudulently misrepresented the actual status of his loan.

The payment holidays schemes did not end with inducing customers to accept payment holidays. Indeed, that was only the first step in the fraudulent scheme. The interest attributable to payment holidays was thereafter charged on an ongoing basis, included in final loan pay-offs, and collected from customers, generally without their knowledge or consent. PNC made use of the enterprise to complete the tasks necessary for the accomplishment of the fraudulent scheme.

As the payment holiday program proceeded, PNC had *actual knowledge* that its payment holidays letters were deceiving its customers. For example, Mr. Harold Pattison, a PNC loan customer who had reached the end of his loan, complained that the payment holiday letters had been misleading because they did not disclose the interest that would be incurred. A person claiming to act on behalf of PNC at first denied that there had been other such complaints. The representative later admitted that, in fact, there had been complaints by loan customers that the original payment holiday solicitations were misleading. Moreover, when PNC loan customer Betsy Dean complained of added interest charges due to payment holidays she and her husband had accepted, a PNC representative admitted to her that *no customer should ever accept a payment holiday because payment holidays are not what they appear to be.*

The fact that undisclosed interest was charged as a result of payment holidays was concealed from PNC

customers throughout the scheme, even after the termination of such customers' loans. This was accomplished through PNC's association with other entities comprising the enterprise, including but not limited to a host of legally separate entities such as automobile dealers. Moreover, to the extent customers learned and complained after the fact of the fraudulent charges that had been imposed upon them, PNC and other entities comprising the enterprise — including but not limited to legally separate automobile dealers, credit bureaus, and collection agencies — reported, attempted to collect, and did collect the fraudulent charges.

### C. The Proceedings Below

This action commenced on August 5, 1997. The complaint asserted causes of action for (1) fraud, (2) negligent misrepresentation, (3) rescission, (4) breach of contract, (5) promissory estoppel, (6) breach of fiduciary duty, (7) usury (governed by federal law), (8) violation of the National Bank Act, 12 U.S.C. §§ 85, 86, (9) violation of 18 U.S.C. § 1962(c) (RICO), and (10) unjust enrichment. PNC moved to dismiss the action pursuant to Rule 12(b)(6). On January 20, 1998, after plaintiffs filed their memorandum in opposition and PNC filed its reply, plaintiffs filed a request to supplement their opposition with evidence, in order to respond to fact-dependent arguments contained in PNC's reply.

On March 6, 1998, the district court granted PNC's motions to dismiss, entering judgment against plaintiffs and dismissing the entire action with the words "This action is CLOSED." App. D, p. 55a. While the district court stated that it was granting plaintiffs' "motion to supplement their opposition to the motion for summary judgment (Doc. 20) [sic]" (App. D, p. 53a), the court only said so in the order in

which plaintiffs' entire action was dismissed without leave to amend. Thus, plaintiffs asked for, but without explanation were never given, an opportunity to supplement their opposition with evidence, much less amend the complaint. Therefore, on March 16, 1998, plaintiffs filed a motion (a) reminding the district court that, in their opposing memoranda, they had addressed matters that the court's decision overlooked and had requested opportunities to amend the complaint, if necessary, and (b) asking the court again for an opportunity to amend. The district court did not deny this motion until April 13, 1998. App. C. In the interim, plaintiffs filed their notice of appeal from the judgment dismissing the action. The district court denied plaintiffs' motion without addressing plaintiffs' post-judgment request to amend. Therefore, plaintiffs filed another motion, again bringing plaintiffs' post-judgment request to amend to the district court's attention. Since this motion was filed after plaintiffs filed their notice of appeal, the motion asked the district court to issue an order pursuant to First National Bank of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976), indicating its inclination to grant plaintiffs permission to amend their complaint. The district court denied that motion on April 9, 1999. App. B. Plaintiffs also appealed from that ruling and the two appeals were consolidated.

The Sixth Circuit affirmed the dismissal of the action and the denial of leave to amend. App. A, p. 1a. The Sixth Circuit subsequently denied plaintiffs' Petition for Rehearing *En Banc*. App. E, p. 57a.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### A. Introduction

This case presents a multitude of important federal issues that are ripe for review by this Court. In affirming the dismissal of the named plaintiffs' RICO claim, the Sixth Circuit adopted a significant new pleading rule, requiring RICO plaintiffs to plead "continuity," "coordination," or "ongoing organization" when alleging an "association-in-fact" enterprise. This new rule conflicts with other appellate decisions from within and outside the Sixth Circuit. One other Circuit follows the rule just adopted by the Sixth Circuit. By granting review, this Court could resolve the conflict among the Circuits on this important RICO question. Sup. Ct. Rule 10(a).

The lower courts' decisions sanctioning dismissal of plaintiff Borchers' TILA claim stand for the proposition that a bank can unilaterally impose a finance charge on a loan customer's account for a transaction that the customer never authorized and then conceal that finance charge from the loan customer, all without violating TILA. As one exasperated court commented under comparable circumstances, "So much for the Truth in Lending Act as a protection for borrowers." Emery v. American General Finance, Inc., 71 F.3d 1343, 1346 (7th Cir. 1995).

Furthermore, the decisions below regarding dismissal of the National Bank Act claim subvert the "most favored lender" doctrine and the federal regulation implementing it. Finally, the lower courts' contradictory decisions cutting off plaintiffs' right to amend their complaint make a mockery of Rule 15(a) and this Court's decision in Foman v. Davis, 371

U.S. 178 (1962), particularly in light of the Sixth Circuit's holding that the RICO claim must be dismissed based on a brand new pleading rule that the district court had never addressed and the parties had never briefed.

### B. The Sixth Circuit Sustained The Dismissal Of The RICO Claim On A Ground That The District Court Had Not Addressed And The Parties Had Not Briefed. That Holding Adopted A New Technical Rule Of RICO Pleading That Conflicts With Prior Case Law From The Sixth Circuit And Another Circuit. This Court Should Grant Review To Resolve The Conflict Among The Circuits As To Whether A RICO Plaintiff Must Plead "Continuity," "Coordination," And "Ongoing Organization" When Alleging An "Association-In-Fact" Enterprise.

The Sixth Circuit affirmed the dismissal of plaintiffs' RICO claim, but not for the reason given by the district court. The district court dismissed that claim based on its conclusion that the entities comprising the alleged association-in-fact enterprise were all subdivisions or agents of the defendant, PNC. The Sixth Circuit held this was error because

> it is not clear from the pleadings . . . that the "dealers" (to take one example) are subdivisions, agents or members of PNC, and to so conclude requires an inference drawn against Begala, the non-moving party. Drawing that inference would violate established practice under Fed. R. Civ. P. 12(b)(6) and the rule that RICO pleadings are to be liberally construed.

App. A, pp. 11a-12a. The Sixth Circuit went on to hold, however, that the RICO claim was nonetheless defective because plaintiffs failed to plead an association-in-fact enterprise. Id. at 12a. That court concluded that plaintiffs failed to allege an "ongoing organization" whose members functioned as a "continuing unit" and engaged in "coordinated behavior." Id.

The Sixth Circuit's decision is based on a perceived *pleading deficiency* under Rule 12(b)(6), not an evidentiary deficiency under Rule 56. As such, it adopts a new technical rule of pleading, which requires RICO plaintiffs to *plead* "continuity," "coordination," and "ongoing organization" when alleging an "association-in-fact" enterprise. In United States v. Turkette, 452 U.S. 576, 585 (1981), this Court held that a RICO plaintiff must *prove* those three attributes of an association-in-fact enterprise. Ever since, courts have been divided over whether a plaintiff must plead them specifically. In Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 790 (3d Cir. 1984), the Third Circuit held that, while Turkette required a plaintiff to "prove that an alleged enterprise possesses the three described attributes," the plaintiff is not required to *plead* them. The Fifth Circuit adopted the opposite view in Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 427 (5th Cir. 1987). Prior to this case, the only Sixth Circuit decision to address this issue was McNeil v. Salan, 1992 U.S. App. LEXIS 11476, an unpublished decision that adopted "[t]he approach of the Third Circuit in Seville" as "more appropriate." Id. at *8. On that basis, McNeil reversed the dismissal of the plaintiff's RICO claim.

In sum, the Sixth Circuit's new pleading rule is contrary to Seville and McNeil, and aligned with Montesano. The court of appeals adopted the rule without even framing the discrete issue discussed in those decisions, without mentioning

any of those decisions, and without acknowledging the split of authority on the issue. This Court should grant review to resolve the conflict among the Circuits on this important RICO question.[2]

That the Sixth Circuit adopted this RICO pleading rule carelessly is further demonstrated by the fact that the court of appeals actually overlooked allegations from which the "ongoing organization," "continuing unit," and "coordinated behavior" attributes could readily be inferred. The complaint identifies an "association-in-fact" enterprise and describes its members, who were and are "engaged in legitimate banking activities, in addition to the pattern of racketeering activity and collection of unlawful debt . . . ." This is not an enterprise that is alleged to have carried out a single act of fraud, then ceased. Its continuity is evident from the allegation that it "carried out" many "related schemes . . . over a number of years, beginning at least in 1987 and continuing at least through 1993, and threatening to continue through this day." That it was an

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[2] The procedural posture of this case should have prompted the Sixth Circuit at least to remand for amendment of the RICO claim. As noted, the decision affirmed a dismissal rendered under Rule 12(b)(6), not Rule 56. The district court found the complaint deficient, but never mentioned the pleading deficiency that the Sixth Circuit perceived, for the pleading rule did not exist until the court of appeals' decision. Hence, the parties did not address that supposed deficiency on appeal, and the Sixth Circuit panel never questioned the parties about it at oral argument. Because the district court and the parties did not address the supposed pleading deficiency, the court of appeals' holding effectively cut off any opportunity for plaintiffs to amend and correct. Given the ease with which most technical pleading deficiencies can be corrected, cutting off that opportunity violates this Court's principle that cases should be tried on their merits rather than on the technicalities of pleading. *See* Section D, *post*.

"ongoing unit" with "coordinated" activities is evident from the allegation that its related schemes shared one long-range purpose: "causing consumers to incur and pay, without knowledge, unlawful fees and interest on various loan transactions." To achieve that common objective, enterprise members naturally performed varying functions over the period alleged. Consider, for example, the role that car dealers played in facilitating the schemes. Over the time period mentioned above, the dealers transmitted fraudulent loan pay-off amounts to PNC loan customers when the latter traded in cars covered by PNC loans, then the dealers collected those amounts. That this scheme represented "coordinated behavior" between PNC and the dealers is self-evident: the pay-off amounts, in which PNC was alleged to have embedded unlawful charges related to payment holidays, could only have come from PNC, which knew of their fraudulent nature and used this artifice to collect the fraudulent charges. By concluding that plaintiffs had not demonstrated "continuity," "coordination," or "ongoing organization," the Sixth Circuit did precisely what it found the district court had done: it improperly drew inferences against plaintiffs and failed to construe their RICO allegations liberally.

### C. PNC Gave Mr. Borchers A Payment Holiday That He Never Authorized, Then Unilaterally Charged His Account For The Extension, Without Disclosing Any Of This To Borchers. The Sixth Circuit Held That PNC Was Not Required To Disclose This Fraudulent Finance Charge To Borchers Under The Truth-In-Lending Act Because This Transaction Occurred After Borchers Entered Into His Original Loan Agreement.

The Sixth Circuit held that plaintiff Steven Borchers could not assert a TILA claim arising out of PNC's unilateral

imposition of an unauthorized extension for which the Bank charged him $100.79 plus undisclosed interest.

Borchers' TILA claim is based on the following allegations: PNC gave Borchers a payment holiday for the month of February 1994 without obtaining authorization from Borchers or his wife. On this occasion, PNC charged Borchers' account an extension fee of $100.79 and additional interest, all without the consent, authorization, or knowledge of Borchers or his wife. PNC did not disclose this unauthorized extension fee and interest until the end of Borchers' loan, and only after Borchers demanded an explanation why his payoff amount was so high.

The district court dismissed Borchers' TILA claim without addressing whether the *unauthorized* payment holiday imposed on him violated TILA. The Sixth Circuit affirmed the dismissal, holding that PNC was not obligated to disclose this unilaterally added finance charge because TILA only required disclosures at the time Borchers entered into his original loan agreement with PNC. The notion that a bank can unilaterally charge a loan customer's account for a transaction that the customer never authorized and then conceal that charge from the customer is totally antithetical to the purposes of TILA and Regulation Z.

TILA requires the disclosure of finance charges to credit customers. 15 U.S.C. § 1638(a)(3) and (b)(1); *see also* 12 CFR §§ 226.4, 226.5, 226.18. Finance charges are "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a); *see also* 12 CFR § 226.4. Under 15 U.S.C. § 1640(a), "any creditor who fails to comply with any requirement imposed under [the Truth-in-Lending Act] . . .

with respect to any person is liable to such person" for actual damages and statutory penalties.

*Unauthorized* payment holidays, such as that which PNC imposed on Borchers without his or his wife's knowledge, constitute credit transactions under TILA, for which accurate disclosures are required. 15 U.S.C. § 1602(d), (e), (f), and (h); 15 U.S.C. § 1605(a); 15 U.S.C. §§ 1632(a) and (b); 15 U.S.C. § 1638(a)(3) and (b)(1); 12 CFR § 226.2(p), (q), (s), (bb); 12 CFR §§ 226.4, 226.5, 226.17(a), 226.17(c)(1) and (2), 226.18. PNC is liable under TILA for failing to make such disclosures. Once a district court "'finds a violation [of TILA], no matter how technical, it has no discretion with respect to the imposition of liability.'" Purtle v. Eldridge Motor Sales, Inc., 91 F.3d 797, 801 (6th Cir. 1996).

Unauthorized, undisclosed interest charges resulting from unilaterally imposed extensions are precisely the sort of credit abuses the Truth-in-Lending Act was intended to prevent. The Report of the House Committee on Banking and Currency concerning the Truth-in-Lending legislation noted that credit costs "are complicated by 'add-ons'" and that, "[a]s a matter of fair play to the consumer, the cost of credit should be disclosed fully, simply, and clearly." House Report No. 90-1040, December 13, 1967, p. 4. The Committee's Report went on to recommend passage of the legislation in order "to assure . . . [f]ull and accurate information to the borrower . . . ." In the years since enactment of TILA, the courts, including this Court, have repeatedly emphasized that it was intended to protect consumers from fraudulent credit practices. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363, 93 S.Ct. 1652 (1973); H.R. Rep. No. 90-1040 [quoted above]); Nussbaum v. Mortgage Service America Co., 913 F.Supp. 1548, 1553 (S.D. Fla. 1995).

Travis v. Boulevard Bank N.A., 880 F.Supp. 1226, 1230 (N.D. Ill. 1995), is the key decision supporting Borchers' position that PNC violated TILA by failing to make accurate disclosures concerning the unauthorized payment holiday that the Bank imposed on him in February 1994. The defendant in Travis, like PNC here, was the bank that had extended the plaintiffs' car loan. The complaint in Travis alleged that, after the commencement of the plaintiffs' loan, the bank procured automobile insurance following the plaintiffs' purported failure to do so and charged the plaintiffs' loan account for such insurance. The plaintiffs alleged that the bank's purchase and subsequent charges against their loan account were not authorized. The plaintiffs further alleged that unilaterally charging their loan account for the unauthorized insurance premiums constituted a "finance charge" that the bank was obligated to disclose under the Truth-in-Lending Act.

In Travis, the plaintiffs specifically argued that, "because this charge came after the original loan, . . . it constitutes a new credit transaction requiring new disclosures" under TILA. Id. at 1229. In denying the bank's motion to dismiss under Rule 12(b)(6), the district court in Travis agreed with the plaintiffs, holding that

> the Defendant's purchase of the allegedly unauthorized insurance and the subsequent addition of the resulting premiums to Plaintiffs' existing indebtedness constituted a new credit transaction. Defendant's action involved augmenting Plaintiffs' existing finance charge with an additional finance charge for the resulting premiums. *This transaction required new disclosures under TILA.*

Id. at 1229-30 (emphasis added). The defendant in Travis also contended "that even if its initial disclosure became inaccurate because of its own action . . . , [12 CFR] § 226.17(e) [of Regulation Z] nevertheless dictates that the disclosure is not a violation of the regulation." Travis, 880 F.Supp. at 1230. The court in Travis disagreed, stating:

> The nature of the example given in the Staff Commentary to § 226.17(e) - a failure by the consumer to fulfill a prior commitment - suggests that the immunity for inaccuracies caused by subsequent events is not to be afforded to the creditor *when the creditor causes the events that result in the inaccuracies*. Applying § 226.17(e) where the subsequent inaccuracy was caused by the creditor would transform TILA, the purpose of which is to advance the informed use of credit on the part of the consumer, see 15 USC § 1601(a), into a potential vehicle for fraud by creditors. Considering the fact that TILA is to be interpreted liberally to achieve its purpose, Smith v. Fidelity Consumer Discount, 898 F.2d 896, 898 (3d Cir.1990); Bizier v. Globe Fin. Servs., 654 F.2d 1, 3 (1st Cir.1981), the court concludes that Defendant's interpretation of § 226.17(e) cannot be right.

Id. (emphasis added).

Just as with the unauthorized finance charges imposed in connection with the Travis bank's purchase of insurance, the finance charges that PNC added to Borchers' existing loan in connection with the alleged unauthorized payment holiday constituted a new transaction for which new TILA disclosures

were required. Id. at 1229-30. Moreover, PNC cannot escape liability under TILA by claiming that the unauthorized payment holiday was merely a subsequent agreement that rendered inaccurate the TILA disclosures PNC had made in connection with the original loan. 12 CFR §§ 226.5(e) and 226.17(e). The original loan agreement never mentioned payment holidays. In terms of the conduct of the lender, the unauthorized purchase of insurance in Travis is no different from the fraud committed by PNC against Borchers in this case. Borchers was the victim of an unauthorized payment holiday resulting in undisclosed additional finance charges, just as the plaintiff in Travis was the victim of the unauthorized purchase of insurance resulting in undisclosed additional finance charges. Borchers knew no more about the fraud PNC was perpetrating against him than Travis knew about her lender's unauthorized purchase of insurance. In both cases, the lender alone caused any "inaccuracy," as that term is used in 12 CFR §§ 226.5(e) and 226.17(e). Like the defendant in Travis, PNC cannot hide behind 12 CFR §§ 226.5(e) or 226.17(e).

An unauthorized payment holiday that immediately costs the customer $100.79, not to mention added interest thereafter, is the ultimate in "uninformed" credit, which TILA was intended to prevent. By imposing an unauthorized payment holiday on Borchers in February 1994, along with the attendant finance charges, and by failing to make the requisite disclosures, PNC violated TILA.

In the Sixth Circuit's prior decision addressing PNC's payment holiday program, Begala v. PNC Bank ("Begala I"), 163 F.3d 948 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 166 (1999), the court of appeals concluded that Travis was decided correctly. Begala I, 163 F.3d at 951 n. 1. The issue before the Sixth Circuit in Begala I was whether or not an *authorized* payment holiday required a bank to make TILA disclosures

(*i.e.*, finance charges). In Begala I, the Sixth Circuit held that a payment holiday authorized by the customer was a "subsequent *agreement*" under 15 U.S.C. § 1634 (emphasis added) and, thus, did not trigger TILA's disclosure requirements. Begala I, 163 F.3d at 951 n. 1. In reaching that conclusion, however, the Begala I court specifically distinguished Travis, stating that the Travis court had "correctly concluded that" the *unauthorized* additional charges *unilaterally* imposed by the lender there "'constituted a new credit transaction,'" which "'required new disclosures under TILA.'" Id.

In the instant case, however, the Sixth Circuit attempted to recast its endorsement of Travis in Begala I, stating:

> We held in *Begala I* that payment deferrals cannot be construed as new credit transactions, and *Travis* was distinguishable because the bank in that case had increased the principal amount of the plaintiff's indebtedness. *See* [Begala I, 163 F.3d at 951 n. 1]. In this case, there is no allegation that the principal amount of the loans increased and, accordingly, no basis for distinguishing the present case from *Begala I*.

App. A, p. 9a. The Sixth Circuit thus assumed that the unauthorized payment deferral by PNC did not increase the principal amount of Borchers' loan. This is a faulty assumption. To arrive at it, the court of appeals reached well beyond the allegations of the complaint, disregarding – indeed, contradicting – at least three of its salient allegations. First, Paragraph 19 of the complaint alleged that,

> on or about February 15, 1994, PNC gave Borchers a payment holiday for the month of

> February 1994 without obtaining authorization from Borchers or his wife. On this occasion, *PNC charged Borchers' account an extension fee of $100.79* plus additional interest, all without the consent or authorization of Borchers or his wife.

(Emphasis added). Second, the court of appeals disregarded plaintiffs' allegation that PNC knew its payment holidays "would impose *new and greater debt burdens* on customers." Third, the Sixth Circuit disregarded plaintiffs' allegation that a payment holiday increased a PNC loan customer's indebtedness in that it left him with an artificially elevated balance, against which interest was then applied.

In other words, if a PNC loan customer sought to pay off his or her principal loan balance immediately after a payment holiday, the customer would owe more *in principal* than he or she would have owed absent the payment holiday. Had the Sixth Circuit properly treated those allegations as true, as required under Rule 12(b)(6), it would not have drawn its faulty distinction between this case and Travis, and would properly have concluded, consistent with Travis, that an unauthorized payment holiday granted by a bank and the undisclosed finance charges unilaterally imposed as a result of it violate TILA's disclosure requirements. The Court should grant review in order to dispel the dangerous notion that a bank can unilaterally charge a loan customer's account for a transaction that the customer never authorized and then conceal that charge from the customer.

### D. The Sixth Circuit Affirmed The District Court's Denial Of Leave To Amend The RICO Claim, Mistakenly Concluding That Plaintiffs Had Not Sought Leave To Amend. The District Court Itself Acknowledged That Plaintiffs Requested Leave To Amend, But Denied That Request Because It Was Not Made Before The Judgment Of Dismissal Was Entered. The Lower Courts' Decisions Are Contrary To Foman V. Davis, 371 U.S. 178 (1962).

Following the district court's entry of judgment dismissing the RICO claim, plaintiffs filed a motion seeking to amend it. Plaintiffs carefully explained to the district court that the aim of their motion was "*permission to amend in the ways suggested in the instant Motion . . . .*" (Emphasis added.) The district court recognized that motion as seeking, "in essence, an order permitting them to amend their complaint." App. B, p. 23a. The district court denied the motion because plaintiffs did not seek leave to amend while the Rule 12(b)(6) motion was still pending, but only after it had been granted and judgment had been entered. Id. (justifying denial of leave to amend because plaintiffs "had not moved for leave to amend the complaint *prior to the Court's consideration of the motion to dismiss*"; emphasis added). Plaintiffs have found no other case denying leave to amend a supposedly deficient claim on that basis.

That result cannot be squared with Foman v. Davis, 371 U.S. 178, 182 (1962). The fact that plaintiffs "had not moved for leave to amend the complaint prior to the Court's consideration of the motion to dismiss" simply did not justify denying leave to amend. The mere fact a plaintiff delayed asserting certain facts – for example, until after the granting of

a motion to dismiss – does not, by itself, justify denying him the right to amend and add those facts. In fact, Foman involved a request to amend that was not made until *after* a judgment had been entered dismissing that case. The standard enunciated in Foman applies whether the request to amend was made before or after judgment.

In affirming the district court's denial of leave to amend the RICO claim, the Sixth Circuit simply declared that, despite the trial court's acknowledgement that plaintiffs sought leave to amend, plaintiffs' motion "was not a motion to amend; it was an effort to obtain an advisory opinion from the court." App. A, p. 18a. The district court specifically recognized and treated plaintiffs' motion as seeking leave to amend and explicitly denied it as such. Since the district court treated plaintiffs' motion in every respect as one seeking leave to amend, the Sixth Circuit should have analyzed whether that court's denial of leave comported with Rule 15(a) and Foman, 371 U.S. at 182. Had the court of appeals done so, it would have been compelled to conclude that the district court improperly denied leave to amend under Rule 15(a) and Foman.

Rule 15(a) mandates that leave to amend "shall be freely given when justice so requires." This Court stated in Foman that "[t]his mandate is to be heeded." Foman, 371 U.S. at 182. The Court stated:

> If the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

> deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, etc. — the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. Plaintiffs urge the Court to grant review and to hold that a district court abuses its discretion when it denies leave to amend for the reason – cited by the district court in this case – that the plaintiff did not move for leave to amend until after the entry of dismissal. Id. The district court's stance amounted to an "outright refusal to grant leave," which Foman clearly declared to be an abuse of discretion. Id.[3]

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[3] The district court also sought to justify denying leave to amend because plaintiffs "had not identified the manner in which they would amend the complaint if permitted to do so." App. B, p. 23a. That inaccurately characterizes plaintiffs' motion, in which plaintiffs identified *two* contemplated amendments. The district court also sought to justify denying leave to amend by suggesting that plaintiffs had failed to demonstrate "that any amendment would not be futile." App. B, p. 24a. There was no indication that the district court actually concluded the contemplated amendments would have been futile. Indeed, how could the district court say on the one hand that plaintiffs had "failed to indicate the manner in which they would amend the complaint" (App. B, p. 23a), then on the other conclude that the amendments contemplated by plaintiffs would have been futile?

### E. The Sixth Circuit Affirmed The Dismissal Of Plaintiffs' Cause Of Action Under The National Bank Act. The Court Of Appeals' Interpretation Of The Relevant Statutory Provisions Subverts The Most Favored Lender Doctrine And The Federal Regulation Implementing It.

A national bank such as PNC violates the National Bank Act when it charges higher interest than relevant state law permits the "most favored lender" to charge. Kenty v. Bank One, Columbus, N.A., 92 F.3d 384 (6th Cir. 1996). PNC conceded below that the extension fees and interest the Bank charged in connection with payment holidays constituted "interest" within the meaning of the National Bank Act. 12 U.S.C. §§ 85, 86; Smiley v. Citibank, 116 S.Ct. 1730, 1735-6 (1996); 12 CFR § 7.4001(a). PNC's motion to dismiss raised the question whether such fees and interest violated Ohio's usury laws and, thus, the National Bank Act.

PNC charged flat extension fees, usually $60.00, for payment holidays. These flat charges can easily be converted to percentages and annualized for any PNC loan affected by a payment holiday. Smiley, 116 S.Ct. at 1736 ("Any flat charge may, of course, readily be converted to a percentage charge — which was indeed the basis for the 19th-century decisions holding that flat charges violated state usury laws establishing maximum 'rates.'"). Each time PNC charged Ms. Edwards $60.00 to defer her normal month's installment of approximately $243.00, the Bank charged her "interest" that amounted to more than 24 percent per month and almost 300

percent per annum. This is clearly higher than the highest numerical interest rate allowed by any Ohio usury statute.[4]

The district court held that plaintiffs failed to state a claim under the National Bank Act because, the court concluded, PNC was allowed to charge fees and interest pertaining to payment holidays *without statutory limit*[5] and the Sixth Circuit affirmed. While this question involves Ohio's

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[4] The maximum numerical interest rates specified in Ohio's various usury statutes range from eight percent (8%) to twenty-eight percent (28%) per annum. Ohio Rev. Code §§ 1107.23, 1107.26, 1107.261, 1107.27, 1301(B)(4), 1317.06, 1317.061, 1321.02, 1321.13(A) and (I), 1321.131, 1343.01(A), 1343.03.

[5] The Office of the Comptroller of the Currency ("OCC") is the federal agency that regulates national banks such as PNC. Plaintiffs' counsel contacted the OCC and requested what the agency used as the maximum interest rate chargeable by a national bank in Ohio. The OCC is the agency in charge of enforcing the National Bank Act's usury provisions. When plaintiffs' counsel called the agency, he was referred to the Central District Office in Chicago, which oversees Ohio national banks such as PNC. While disclaiming any "representations as to its accuracy," the OCC office in Chicago faxed a chart to plaintiffs' counsel, which "was compiled for [the agency's] internal use." The chart shows all of the applicable maximum rates for all of the various types of loans that national banks in Ohio might conceivably make. Under none of these categories does the chart suggest the rate is "unlimited." While plaintiffs' counsel recognize the disclaimers this chart carries, it is nonetheless worth noting that, while PNC asserts the right to charge whatever interest rates it wishes under the National Bank Act, the federal agency charged with enforcing the National Bank Act at least internally regards PNC as subject to Ohio usury law via the National Bank Act. The chart faxed by the OCC was made part of the record.

usury statutes, the lower courts' decisions have far-reaching implications for the "most favored lender" doctrine.

PNC should not be able to invoke that doctrine because the Ohio usury statutes involved, Ohio Rev. Code §§ 1151.21 and 1161.28, contain two significant qualifications that PNC cannot meet. The two statutes permit an Ohio "building and loan" or "savings bank" to "assess and collect . . . *such interest* on *loans made*" as is "*provided for in its constitution and bylaws*." Ohio Rev. Code §§ 1151.21 and 1161.28 (emphasis added). Thus, the two material qualifications that must be met before a national bank can lawfully charge unlimited interest under §§ 1151.21 and 1161.28 are that (1) the transaction for which interest is charged must be a "loan" in and of itself, id., and (2) the unlimited interest assessed must be provided for in the bank's "constitution and bylaws." Id.

PNC cannot satisfy the first prerequisite because, in Begala I, the Sixth Circuit held that a payment holiday authorized and accepted by a loan customer "cannot be construed as a new credit transaction . . . ." Begala I, 163 F.3d at 951-52. PNC cannot have it both ways: if authorized payment holidays are not separate credit transactions, they cannot constitute "loans made" within the meaning of the usury statutes.

Even if PNC could have established that it met the first qualification in the two Ohio usury statutes, PNC still would not have been entitled to dismissal of the NBA claim because the Bank could not establish that it satisfies the second one, *i.e.*, that the unlimited interest the bank claimed the right to charge was "provided for in [the bank's] constitution and bylaws." The lower courts' decisions allowing PNC to invoke the most favored lender doctrine under Ohio's usury laws despite the Bank's inability to satisfy the state statutes' "constitution and

bylaws" requirement completely disregards 12 CFR § 7.4001(b). This National Bank Act regulation states that "[a] national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state," but makes clear that, "[i]f state law permits different interest charges on specified classes of loans," a national bank seeking to charge the same interest rate as is specified for such classes of loans must satisfy "the provisions of state law relating to that class of loans that are *material to the determination of the permitted interest*." Id. (emphasis added). Not only is the "constitution and by-laws" qualification "material to the determination of the permitted interest," it is, in fact, *directly* determinative of the permitted interest rate. This is because, if the interest rate is not provided for in the bank's constitution and by-laws, then a bank simply cannot charge that interest rate consistent with §§ 1151.21 and 1161.28. This goes for Ohio's savings banks and savings and loans *and* national banks like PNC. Because the Sixth Circuit's holding subverts the most favored lender doctrine, review should be granted.

## CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Petition be granted.

Respectfully Submitted,
/s/_____
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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 7, 2000]

No. 98-3360, 99-3652

JOHN A. BEGALA, STEVEN W. BORCHERS, CYNTHIA EDWARDS,
*Plaintiffs-Appellants,*

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,
*Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
No. 97-00717 - Sandra S. Beckwith, District Judge.

Argued Feb. 3, 2000

Before: WELLFORD, BATCHELDER, and DAUGHTREY, Circuit Judges.

## OPINION

ALICE BATCHELDER, Circuit Judge. Plaintiff John Begala filed his first lawsuit against PNC Bank on January 23, 1997. The lawsuit was based upon allegations that PNC violated the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., as well as various state laws by offering "payment holidays" to its loan customers without fully disclosing the additional interest that those customers would incur by accepting PNC's offer. Defendant PNC sought dismissal under Fed.R.Civ.P. 12(b)(6), and the district court dismissed plaintiff's TILA claims on July 30, 1997. [1] Begala brought a timely appeal and we affirmed the district court's decision on December 28, 1998. *See Begala v. PNC Bank (Begala I)*, 163 F.3d 948 (6th Cir.1998), *cert. denied*, 120 S.Ct. 166 (1999).

Begala again filed suit against PNC in the same federal court on August 5, 1997, while the appeal in *Begala I* was still pending. In the second suit, Begala alleged the same facts he had pled in *Begala I*, but this time he alleged violations not only of TILA and the same assortment of state laws but also the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and the National Bank Act ("NBA"), 12 U.S.C. §§ 85 and 86. PNC again moved for dismissal arguing that the duplicative claims in second suit were barred by res judicata and that the new

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[1] The district court evaluated the sufficiency of plaintiff's federal claims only. The pendent state law claims were then dismissed with the federal claims because the court declined to exercise supplemental jurisdiction over the state claims.

claims failed to state a claim upon which relief could be granted under Fed.R.Civ.P. 12(b)(6). In response to PNC's motion, Begala amended his complaint to add two new plaintiffs, Stephen Borchers and Cynthia Edwards. PNC countered by again moving to dismiss the amended complaint citing res judicata and failure to state a claim under Fed.R.Civ.P. 12(b)(6).

On March 6, 1998, the district court dismissed all of plaintiffs' federal claims, finding that Begala's individual claims were barred by the doctrine of res judicata and that the remaining claims were insufficient under Fed.R.Civ.P. 12(b)(6).[2] Plaintiffs took a two-fold approach to attacking that decision. First, they filed a timely notice of appeal from the order dismissing their claims. Second, they sought clarification of the order by the district court under Fed.R.Civ.P. 60(b) on the issue of whether the plaintiffs would be allowed to amend their complaint. The district court denied the plaintiffs' motion for clarification on April 9, 1999, and plaintiffs' sought a timely appeal from the April 9th order as well. The appeals have been consolidated for consideration by this Court.

## I. FACTUAL BACKGROUND

The facts in this case are generally undisputed. Plaintiffs Begala, Borchers and Edwards all took out

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[2] As in *Begala I*, the district court evaluated the sufficiency of plaintiffs' federal claims only. The pendent state law claims were then dismissed with the federal claims because the court declined to exercise supplemental jurisdiction over the state claims.

installment loans with PNC's predecessor in interest. After PNC acquired the loans, PNC sent periodic letters to these (and other similar) debtors offering a "payment holiday." The terms of the letter indicated that the customer would be allowed to skip a payment now in return for the customer's agreement (1) to pay an "extension fee" in place of the monthly payment and (2) to pay an additional payment at the end of the loan.[3]

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[3] PNC's offer of payment holiday to John Begala on May 21, 1993 follows:

> PNC Bank would like to help you accumulate some extra cash during the vacation season by giving you an opportunity to postpone one loan payment.
>
> Here's how it works. The authorization form attached below lists a loan extension fee, which is the payment you make now in order to postpone your regular payment. Simply sign the authorization and forward it along with your extension fee payment. Your loan term will automatically be extended by the one payment you're postponing now.
>
> That's all there is to it. This offer is good until July 31, 1993 so you can postpone your June or July payment.
>
> If you'd like to take advantage of this offer, here's your chance. Remember, just sign and detach the authorization provided below and return it with your extension payment in the

The plaintiffs each allege that when the time came to pay off their respective loans, they were unfairly surprised to discover that they had incurred additional interest charges. In addition, plaintiff Borchers alleges that a "payment holiday" was imposed upon him by PNC without his explicit authorization. The plaintiffs allege that this practice of offering payment holidays without fully disclosing the additional fees and interest charges incurred violates federal law, specifically TILA, RICO and NBA. With the exception of the unauthorized payment holiday allegation, PNC generally does not dispute the facts as alleged, but rather claims its practice does not violate any laws.

## II. ANALYSIS

We review *de novo* a district court's dismissal for failure to state a claim. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996). To survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988) (internal quotation marks and citations omitted).

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enclosed envelope. We must receive your authorization and extension payment prior to your regular payment due date in the month during which you wish to postpone a payment.

If you have any questions regarding this offer please call 651-TALK.

> We must treat as true all of the well-pleaded allegations of the complaint. All allegations must be construed in the light most favorable to the plaintiff. In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint.

*Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996) (citations omitted). "Although this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements." *Scheid*, 859 F.2d at 436 (citing 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 596 (1969)). In addition, we review *de novo* district court dismissals of cases on res judicata grounds. *Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658 (6th Cir. 1990).

## A. RES JUDICATA

The district court concluded that named-plaintiff Begala's individual federal claims in this action were barred by res judicata because the claims of *Begala I* were dismissed under Fed.R.Civ.P. 12(b)(6) and Begala simply reasserted the same facts in the present lawsuit. The doctrine of res judicata has four elements:

> 1. A final decision on the merits in the first action by a court of competent jurisdiction;

2. The second action involves the same parties, or their privies, as the first;
3. The second action raises an issue actually litigated or which should have been litigated in the first action;
4. An identity of the causes of action.

*Sanders Confectionery Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992).

Begala's individual claims, previously dismissed by a court of competent jurisdiction, make essentially the same factual allegations between the same parties as did his claims in *Begala I*; therefore, his individual claims are precluded. *See City of Canton v. Maynard*, 766 F.2d 236, 239 (6th Cir. 1985) (per curiam) (affirming district court's 12(b)(6) dismissal of cause of action under principles of res judicata). Begala tries to distinguish this suit from *Begala I* by arguing that while the claims in the first lawsuit were limited to PNC's activities in carrying out its payment holiday program, the second lawsuit challenges the entire scheme of PNC in association with other entities to impose, collect, and cover up unlawful charges. This is a meaningless distinction. The payment holidays Begala challenged without success in *Begala I* are the same payment holidays at issue here. The law does not allow Begala the luxury of returning to federal court with the same set of facts until he succeeds in alleging a federal cause of action. *See Sanders*, 973 F.2d at 484 ("Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'"); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401-2 (1981) (explaining that res judicata is

animated by principles of finality rather than by concerns of individual equity).

**B. TILA**

Plaintiffs Borchers and Edwards claim that PNC violated its duty under TILA to disclose the fact that additional finance charges would be assessed due to the payment holidays, as well as the amount of such charges. Begala made this very argument in his first lawsuit. The district court dismissed it for failure to state a claim, and we affirmed. *See Begala I*, 163 F.3d at 951-52. The only basis that plaintiffs advance for distinguishing this action from the first lawsuit is an allegation in which named-plaintiff Borchers claims that PNC granted him a payment holiday on one occasion without his authorization. Plaintiffs contend that this factual difference brings the current action within the scope of *Travis v. Boulevard Bank, N.A.*, 880 F.Supp. 1226 (N.D. Ill. 1995), a case which we distinguished but nevertheless spoke approvingly of in affirming the dismissal of *Begala I*. Specifically, we said of *Travis*:

> In that case, the bank, without proper authorization, procured insurance against Travis's default and then charged Travis for the premium payments. Faced with a scenario in which the principal amount of a consumer's indebtedness was unilaterally increased by the lender, the district court correctly concluded that the insurance purchase "and the subsequent addition of the resulting premiums to Plaintiffs' existing indebtedness constituted a new credit transaction."

*Begala I*, 163 F.3d at 951 n. 1.

Plaintiffs make much of the fact that PNC's alleged actions, like those of the bank in *Travis*, were unilateral. That, however, is not the basis on which we distinguished *Travis*. We held in *Begala I* that payment deferrals cannot be construed as new credit transactions, and *Travis* was distinguishable because the bank in that case had increased the principal amount of the plaintiff's indebtedness. *See id.* In this case, there is no allegation that the principal amount of the loans increased and, accordingly, no basis for distinguishing the present case from *Begala I*. Thus, the district court properly dismissed plaintiffs' TILA claims.

## C. RICO

Plaintiffs contend that PNC bank working in concert with its affiliated agencies and others have violated federal law by granting payment holidays and then collecting the additional interest and fees from unsuspecting debtors. Specifically, the ninth claim for relief in plaintiffs' complaint reads in pertinent part:

> At all times relevant to this Complaint, Defendant PNC Bank, Ohio, N.A., in conjunction with The Central Trust Company, National Association, The Central Bancorporation, Inc., PNC Financial Corp., New Financial Corp., PNC Bank Corp., various affiliated entities, agencies, accountants, legal counsel, dealers, and John Doe(s) (hereinafter the "Enterprise"), was an association-in-fact "enterprise" as that term is

> defined in 28 U.S.C. § 1961(4), engaged in and affecting interstate commerce. The enterprise was and is engaged in legitimate banking activities, in addition to the pattern of racketeering activity and collection of unlawful debt described below. In addition to defendant, the other entities and persons comprising the enterprise facilitated the racketeering activity by, *inter alia*, creating and/or participating in the creation of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays, as alleged herein; communicating, and/or participating in the communication of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays, as alleged herein; disseminating and transmitting, and/or participating in the dissemination and transmission of, false, inaccurate, misleading, and deceptive payment holiday solicitation letters and other information related to payment holidays; demanding, communicating, collecting, and/or attempting to collect fraudulent and unlawful charges related to payment holidays; and interfering with credit and other financial opportunities of customers who refused to pay charges related to or resulting from payment holidays.

Under RICO, an enterprise is prohibited from engaging in a coordinated effort to collect an unlawful debt. Specifically, the RICO statute provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Plaintiffs' complaint fails adequately to allege the existence of a RICO enterprise, although not entirely for the reasons cited by the district court. The district court held that the complaint had failed to allege an enterprise distinct from PNC because all of the entities listed in the complaint were subdivisions or agents of PNC. Under RICO, a corporation cannot be both the "enterprise" and the "person" conducting or participating in the affairs of that enterprise. *See, e.g., Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989). Under the "non-identity" or "distinctness" requirement, a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members. An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself. *See United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982).

It is not clear from the pleadings, however, that the "dealers" (to take one example) are subdivisions, agents or members of PNC, and to so conclude requires that an inference be drawn against Begala, the non-moving party.

Drawing that inference would violate established practice under Fed.R.Civ.P. 12(b)(6) and the rule that RICO pleadings are to be liberally construed. *See United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985).

Plaintiffs' complaint is nonetheless defective because plaintiffs have wholly failed to plead an association-in-fact. A properly pled RICO claim must cogently allege activity "that would show ongoing, coordinated behavior among the defendants that would constitute an association-in-fact." *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993). In this case, the complaint essentially lists a string of entities allegedly comprising the enterprise, and then lists a string of supposed racketeering activities in which the enterprise purportedly engages. Although the plaintiff may allege the separate elements of "enterprise" and "pattern of racketeering activity" through the same facts, *see Qaoud*, 777 F.2d at 1115, the complaint must contain facts suggesting that the behavior of the listed entities is "coordinated" in such a way that they function as a "continuing unit," *see Frank*, 4 F.3d at 1386. This complaint is entirely devoid of any such factual allegations. Accordingly, plaintiffs have failed to state a RICO claim, and the district court properly dismissed this claim under Fed.R.Civ.P. 12(b)(6).

**D. NBA**

The plaintiffs contend that PNC violated the National Bank Act ("NBA") by charging excessive interest in connection with the payment holidays. Because PNC is a nationally chartered bank, it is governed by the NBA, 12 U.S.C. §§ 38 et seq. (1988). The NBA and its accompanying regulations allow nationally chartered banks to charge interest

up to the maximum amount permitted to the most-favored state-chartered banks in the state in which they are operating. It provides in relevant part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State . . . where the bank is located. . . .

12 U.S.C. § 85. This statute has been interpreted by the United Sates Supreme Court, under the Most Favored Lender Doctrine, to allow banks to charge the rate allowed to the "most favored lenders" under state law. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314 n. 26 (1978) (citing 12 C.F.R. § 7.7310(a)). Therefore, the question becomes one of Ohio state banking law, and the maximum interest rate allowed to banks under Ohio law determines whether PNC has charged excessive interest in this case. *See Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 393 (6th Cir. 1996).

Ohio law allows "building and loan associations" as well as "savings banks" to charge unlimited dues, fines, interest and premiums on loans made. *See* OHIO REV. CODE ANN. §§ 1151.21, 1161.28 (Anderson 1996). Therefore, under the Most Favored Lender doctrine, PNC may also charge unlimited interest on its loans made.

Plaintiffs rely heavily upon our earlier decision, *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996). In *Kenty*, the plaintiffs obtained car loans from the defendant

national bank on the understanding that if they did not purchase auto insurance, the bank would purchase it for them. If the bank did purchase this insurance, the funds to pay the insurance were advanced by the bank and then added to the debtors' loans. The *Kenty* plaintiffs claimed that adding the premiums to their automobile loans constituted excessive interest and violated federal law. The bank countered by arguing that adding the premiums to the loan balance was an advancement of funds that constituted "loans made" and because the Most Favored Lender doctrine allowed the bank to charge any amount of interest on its "loans made;" these charges did not violate the NBA. The *Kenty* court agreed with the bank and concluded that advancing funds to pay the insurance premiums constituted a "loan made." *See Kenty*, 92 F.3d at 393-94.

Plaintiffs misread *Kenty* to require that additional interest charges must be part of a new loan made before a national bank may charge unlimited interest. *Kenty* did not so hold. *Kenty* merely recognized that for the unlimited interest provisions of Ohio Revised Code §§ 1151.21 and 1161.28 to be applicable, the interest must be charged as part of a "loan made." The significant issue before the *Kenty* court was whether the additional funds advanced by the bank to pay the debtors' car insurance premiums were "loans made."[4]

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[4] The *Kenty* decision considered the question, raised by the parties, of whether the advancement of funds to pay the debtors' insurance premiums was forebearance under Ohio Revised Code § 1343.01, rather than a loan made. However, as Judge Merritt plainly recognized, Ohio Revised Code § 1343.01 does not apply to the lending practices of banks in Ohio. *See Gross v. Standard Oil Co.*, 45 Ohio Misc. 45, 345 N.E.2d 89, 91 (Ohio Ct. Common

In this case, PNC bank offered payment holidays that allowed the debtors to defer a regular loan payment by paying an extension fee and then making up the payment at the end of the loan. We specifically held in *Begala I* that these payment deferrals were not new credit transactions. *See Begala I*, 163 F.3d at 951. Plaintiffs' costs associated with their loans did, of course, increase because the plaintiffs chose to extend their payment terms. But, as there was no additional advancement of funds, i.e., no increase in the principal amount of the plaintiffs' loans, *Kenty's* analysis to determine whether an additional advancement of funds constituted a "loan made" is inapplicable to this case.

For each of the loans at issue, PNC made one initial advancement of funds. There is no question that this action constituted a "loan made" as that term is used in Ohio Revised Code §§ 1151.21 and 1161.28. The plaintiffs participated in payment holidays that were not new credit transactions, but simply an increase of fees and interest on that original loan made. Because in Ohio selected banks can charge unlimited fees and interest on loans made, the additional fees and interest charged to the plaintiffs by PNC do not violate the NBA. Plaintiffs' complaint failed to state a cause of action upon which relief can be granted, and their claims under the NBA were properly dismissed.

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Pleas 1975) (recognizing that credit transactions with banking institutions are governed by Chapter 11 of the Ohio Revised Code while credit transactions entered into with other entities are governed by Chapter 13 of the Ohio Revised Code).

## E. Mr. Borcher's Unauthorized Payment Holiday Claim

The district court analyzed each allegation in plaintiffs' complaint, but did not explicitly discuss Mr. Borcher's unauthorized payment holiday claim. The district court apparently viewed the narrow allegation that PNC Bank imposed a payment holiday upon Mr. Borcher without his authorization as a claim sounding in state law and dismissed it with the plaintiffs' other state law claims. We think the district court's view was sound. However, to the extent that Mr. Borcher's claim might be argued as stating a cause of action under federal law, we have reviewed the applicable provisions of TILA and NBA and conclude that Mr. Borcher's allegation has no basis in federal law and is a state law claim only. Therefore, this claim was also properly dismissed by the district court.

## F. Request to Amend Complaint

In connection with their failed RICO claim, plaintiffs argue on appeal that the district court erred in refusing to allow them to amend their complaint. We review for abuse of discretion a district court's denial of a motion to amend. *See LRL Properties v. Portage Metro Housing Auth.*, 55 F.3d 1097, 1104 (6th Cir. 1995).

The district court, on April 13, 1998, ten days after a notice of appeal had been filed, set out appropriate light on its actions in denying this motion:

> The purpose of the motion for clarification is, apparently, to learn whether the Court would

have granted the motions to dismiss had Plaintiffs amended the complaint to add certain allegations. For the reasons that follow, the motion (Doc 28) is **DENIED**.

Plaintiffs contend, in their current motion and the reply memorandum in support thereof, that they requested leave to amend the complaint and that the Court should have granted them permission to do so instead of granting Defendant's motions to dismiss. A review of the docket in this matter reveals that Plaintiffs *never moved for leave to amend their complaint*. Rather, in opposition to the motions to dismiss, Plaintiffs requested that they be permitted to amend the complaint in the event that the Court found it to be deficient.

. . . An open request for the Court to permit amendment to cure deficiencies, once the Court identifies those deficiencies, will not defeat a meritorious motion to dismiss pursuant to Rule 12(b)(6). Had plaintiffs filed a motion to amend the complaint prior to this Court's consideration of the motions to dismiss and accompanied that motion with a memorandum identifying the proposed amendments, the Court would have considered the motions to dismiss in light of the proposed amendments to the complaint. The Court would not have dismissed this action had it been convinced that the deficiencies in the

> complaint would have been cured by the proposed amendments. Absent such a motion, however, Defendant was entitled to a review of the complaint as filed pursuant to Rule 12(b)(6). *Plaintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies* of the complaint and then an opportunity to cure those deficiencies.
>
> In short, the Court did not permit Plaintiffs to amend the complaint because they did not move to do so.

(Emphasis added.)

Plaintiffs argued in their brief that "there was no justification for denying plaintiffs the right to amend." The motion for clarification, as pointed out by the district court, was not a motion to amend; it was an effort to obtain an advisory opinion from the court. Plaintiffs state in their brief in Case No. 98-3360 that they "were never given an opportunity to further clarify their allegations with evidence." (Br. at 24.) Of course, the granting of a defendant's motion to dismiss does not ordinarily afford the unsuccessful plaintiffs any "opportunity to further clarify their allegations" with proof and evidence. What plaintiffs may have stated, almost as an aside, to the district court in a memorandum in opposition to the defendant's motion to dismiss is also not a motion to amend.

The district court did not err or abuse its discretion in denying the post- judgment action of plaintiffs (post notice of appeal) which they characterize as their attempt "to obtain, via

the procedure outlined in *First National Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976), the right to amend they have sought and still seek." As pointed out by defendant in response, this was a second lawsuit by plaintiffs' lawyers "arising out of the same factual allegations." This effort, in our view, was also a second effort to relitigate that which might have been asserted in a complaint, a proposed amended complaint, or in a formal motion to amend prior to an adverse judgment and certainly before filing of a notice of appeal. We do not believe that *Hirsch* constitutes authority to find the district court's decisions to be erroneous nor a basis for a new round of allegations based upon the same factual scenario which resulted in our first decision found in Begala I, 163 F.3d at 948.

## CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

[Filed June 7, 2000]

No. 98-3360, 99-3652

JOHN A. BEGALA, STEVEN W. BORCHERS, CYNTHIA EDWARDS,
*Plaintiffs-Appellants,*

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,
*Defendant-Appellee.*

Before: WELLFORD, BATCHELDER, and DAUGHTREY, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

/s/_____
Leonard Green, Clerk

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed April 9, 1999]

No. C-1-97-717

John A. Begala, et al.,
*Plaintiffs*,

v.

PNC Bank, Ohio, National Association,
*Defendant*.

Order

The Court issued a Memorandum and Order granting Defendant's motion to dismiss Plaintiffs' federal law claims in this action on March 6, 1998. Prior to that time, Plaintiffs had never moved for leave to amend their complaint.[1] After

[1] Plaintiffs repeatedly suggest that they "requested", leave to amend in memoranda in response to motions by Defendant when they asked the court to permit them to remedy any deficiency that it found after considering Defendant's arguments. That sort of

the Court entered judgment, Plaintiffs moved for clarification of the judgment. The "clarification" Plaintiffs sought was, in essence, an order permitting them to amend their complaint. The Court denied that motion on the ground that Plaintiffs had not moved for leave to amend the complaint prior to the Court's consideration of the motion to dismiss. The Court further noted that Plaintiffs had not identified the manner in which they would amend the complaint if permitted to do so. Instead, they had only asked the Court to identify reasons for which a motion under Rule 12(b) (6) would be granted and then, instead of granting such a motion, permit Plaintiffs to amend their claims to avoid the effect of Defendant's motion. See Order of April 13, 1998 (Doc. 31).

After Plaintiffs filed the motion for "clarification" and before the Court had ruled upon that motion, Plaintiffs filed a notice of appeal in this matter. Two weeks later, they filed the motion that is presently before the Court for permission to amend their complaint. The Court notes that Plaintiffs have

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request does not constitute a motion, which, pursuant to Southern District of Ohio Local Rule 7.2(a), must be tendered for filing accompanied by a memorandum in support thereof. Moreover, the Court is not obligated, in response to a motion to dismiss, to identify deficiencies in a pleading and then to permit the party opposing the motion to remedy those deficiencies. See, e.g., Mitsubishi Aircraft International, inc. v. Brady, 780 F.2d 1199, 1203 (5th Cir. 1986). Absent some indication, in response to the motion to dismiss, that Plaintiffs recognized a specific deficiency that could be corrected by an amendment, the Court did not err by failing to consider their bald request, contained in a memorandum in opposition, to amend their complaint to correct any deficiency the Court might find.

again failed to indicate the manner in which they would amend the complaint. They have not attached a proposed amended complaint and have not demonstrated that the contemplated amendments would remedy the deficiencies identified in the Court's March 6, 1998 Memorandum and Order. The Court does not believe that it may properly exercise jurisdiction in this matter to grant Plaintiffs' motion for permission to amend the complaint after Plaintiffs have filed a notice of appeal. The Court would not be inclined to do so, in any event, in the absence of proper support for the motion and a demonstration that any amendment would not be futile. See Foman v. Davis, 371 U.S. 178, 182 (1962).

Plaintiffs' motion (Doc. 35) is, therefore, **DENIED**.[2]

IT IS SO ORDERED.

/s/_____
Sandra S. Beckwith
United States District Judge

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[2] The Court notes that Plaintiffs filed a similar motion after they filed their notice of appeal in the predecessor to this case, case No. C-1-97-74. This Court struck that motion. The Court of Appeals found no error in the Court's action. See Begala v. PNC Bank, Ohio, N.A., 163 F.3d 948, 952 (6th Cir. 1998) .

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION**

[Filed April 13, 1998]

No. C-1-97-717

| | |
|---|---|
| John A. Begala, et al., *Plaintiffs*, | ) |
| v. | ) |
| PNC Bank, Ohio, National Association, *Defendant.* | ) |

**ORDER**

On March 6, 1998, this Court issued a Memorandum and order pursuant to which the Court granted Defendant's motions to dismiss (Doc. 4 and Doc. 13). Plaintiffs then filed a motion for clarification (Doc. 28). The purpose of the motion for clarification is, apparently, to learn whether the Court would have granted the motions to dismiss had Plaintiffs amended the complaint to add certain allegations. For the reasons that follow, the motion (Doc 28) is **DENIED**.

Plaintiffs contend, in their current motion and the reply memorandum in support thereof, that they requested leave to amend the complaint and that the Court should have granted them permission to do so instead of granting Defendants' motions to dismiss. A review of the docket in this matter reveals that Plaintiffs never moved for leave to amend their complaint. Rather, in opposition to the motions to dismiss, Plaintiffs requested that they be permitted to amend the complaint in the event that the Court found it to be deficient.

Such a request is not a motion in conformity with Southern District of Ohio Local Rule 7.2(a) (1), which requires that a motion be accompanied by a memorandum in support thereof including a brief statement of the grounds for the request. An open request for the court to permit amendment to cure deficiencies, once the Court identifies those deficiencies, will not defeat a meritorious motion to dismiss pursuant to Rule 12(b) (6). Had Plaintiffs' filed a motion to amend the complaint prior to this Court's consideration of the motions to dismiss and accompanied that motion with a memorandum identifying the proposed amendments, the Court would have considered the motions to dismiss in light of the proposed amendments to the complaint. The Court would not have dismissed this action had it been convinced that the deficiencies in the complaint would have been cured by the proposed amendments. Absent such a motion, however, Defendant was entitled to a review of the complaint as filed pursuant to Rule 12(b) (6). Plaintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies.

In short, the Court did not permit Plaintiffs to amend the complaint because they did not move to do so. Their motion for clarification (Doe. 28) is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/_____
Sandra S. Beckwith
United States District Judge

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION**

[Filed March 6, 1998]

No. C-1-97-717

John A. Begala, et al.,
*Plaintiffs*,

v.

PNC Bank, Ohio, National Association,
*Defendant*.

**MEMORANDUM and ORDER**

Plaintiff Begala initiated Case Number C-1-97-74 in January 1997 by filing a complaint, styled a "Class Action Complaint," pursuant to which he asserted a claim under the Truth-in-Lending Act, 15 U.S.C. §1601, et seq., as well as various state law claims. Before a motion for class certification had been filed, Defendant moved for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim under federal law upon which relief could be granted. Concluding that Plaintiff Begala had not stated a claim under the Truth-in-Lending Act,

the Court granted Defendant's motion to dismiss. The Court declined to retain jurisdiction over Plaintiff Begala's state law claims.

After the dismissal of Case Number C-1-97-74, Plaintiff Begala initiated this action, based upon the same alleged facts that give rise to Case Number C-1-97-74. He asserted a number of claims based upon Ohio common law, as well as claims under the National Bank Act, 12 U.S.C. §§85 and 86, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, et seq. Defendant promptly moved for the dismissal of Plaintiff Begala's claims pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. Defendant argued that Plaintiff Begala's claims based upon federal law were barred by the doctrine of res judicata, inasmuch as they could have been asserted in Case Number C-1-97-74. Defendant also argued that the claims are subject to dismissal, pursuant to Rule 12(b) (6), to the extent that they are not barred by the res judicata doctrine.

Plaintiff Begala then filed an amended complaint. While Plaintiff Begala's claims were not amended in any material fashion, two Plaintiffs were added. Those Plaintiffs, Steven W. Borchers and Cynthia Edwards, assert claims that are in all material respects identical to Plaintiff Begala's claims. They also assert claims pursuant to the Truth-in-Lending Act. Those claims mirror the claim of Plaintiff Begala that this Court dismissed in Case Number C-1-97-74.

Because Plaintiffs filed the amended complaint after Defendant had moved for the dismissal of Plaintiff Begala's claims, the memoranda filed by the parties in opposition to

and in support of the motion address all of the Plaintiffs' claims and are not based solely upon the res judicata argument that Defendant asserted in the motion. Defendant then supplemented its original motion by filing a motion to dismiss Plaintiff Borchers' and Plaintiff Edwards' claims specifically (Doc. 13). Accordingly, this matter is now before the Court upon motions to dismiss all claims of the Plaintiffs as they are asserted in the amended complaint.

1. Background

Each of the Plaintiffs entered into a loan agreement with Defendant or its predecessor in interest, Central Trust Company. The agreements set forth the applicable interest rates, number of payments, and total cost of credit. The agreements did not mention a feature pursuant to which Plaintiffs could periodically postpone a monthly payment, commonly known as a "payment holiday."

Each of the Plaintiffs exercised the payment holiday option on various occasions. Plaintiffs understood, from the correspondence in which Defendant offered the payment holiday option, that they would be required to pay an extension fee and that the terms of their loans would be extended by one month each time they accepted a payment holiday. Plaintiff Borchers alleges that Defendant imposed a payment holiday upon him in July 1994 in spite of the fact that he did not exercise the option at that time.

Plaintiffs Borchers and Edwards contend that Defendant violated the disclosure requirements of the Truth-in-Lending Act each time it offered them a payment holiday by failing to disclose that the finance charges attendant to the

loans would increase in the event that Plaintiffs exercised the option. All Plaintiffs assert that Defendant violated the National Bank Act, 12 U.S.C. §85 and 86, by charging Plaintiffs interest in excess of the legal limit. Plaintiffs also contend that Defendant violated RICO, 18 U.S.C. §1692(c), by engaging in a pattern of racketeering activity and the collection of unlawful debts. Under Ohio law, Plaintiffs assert claims of fraud, negligent misrepresentation, breach of contract, breach of fiduciary duty, usury, and unjust enrichment. They also assert claims for rescission of their contracts with Defendant and for promissory estoppel.

2. The Rule 12 (b) (6) Standard

A motion to dismiss pursuant to Rule 12(b) (6) operates to test the sufficiency of the complaint. In its consideration of a motion to dismiss under Rule 12(b) (6), the Court is required to construe the complaint in the light most favorable to the Plaintiff and accept all well-pleaded factual allegations in the complaint as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) and Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983) . The Court will not, however, accept conclusions of law or unwarranted inferences that are presented as factual allegations. Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971). The Court will make all reasonable inferences that might be drawn from the complaint. Fitzke v. Shappell, 468 F.2d 1072, 1076-77 n.6 (6th Cir. 1972). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957).

3. Analysis

a. Plaintiff Begala's Federal Claims

Defendant argues that Plaintiff Begala's claims pursuant to the National Bank Act and RICO are subject to dismissal, pursuant to Rule 12(b) (6), on the basis of the res judicata doctrine. Res judicata has four elements:

(1) a final decision on the merits in the first action by a court of competent jurisdiction;

(2) a second action involving the same parties, or their privies, as the first;

(3) the second action raising an issue actually litigated or which should have been litigated in the first action; and

(4) an identity of the causes of action.

See Sanders Confectionery Products, Inc. v. Heller Financial, Inc. 973 F.2d 474, 480 (6th Cir. 1992) (citing King v. South Central Bell Telephone & Telegraph. Co., 790 F.2d 524 (6th cir. 1986); Westwood Chemical Co. v. Kulick, 656 F.2d 1224 (6th Cir. 1981)) , cert. denied, 506 U.S. 1079 (1993).

Plaintiff Begala does not seriously contend that the Court's judgment with respect to his Truth-in-Lending Act claim in Case Number C-1-97-74 was not a final decision on the merits nor that this Court was not a court of competent

jurisdiction as regards that claim based upon federal law[1]. Plaintiff Begala also does not contend that the parties in this action are not the same as the parties in Case Number C-1-97-74. Two of Plaintiff Begala's arguments address the final two elements of res judicata.

Specifically, Plaintiff Begala contends that his National Bank Act claim was asserted in Case Number C-1-97-74 and that the Court declined to rule upon the merits of that claim in the earlier case. Plaintiff Begala also argues that he could not have asserted the RICO claim in Case Number C-1-97-74. The Court will consider those arguments in turn and then will consider Plaintiff Begala's other arguments in response to Defendant's contention that the doctrine of res judicata bars Plaintiff's assertion of the National Bank Act and RICO claims in this action.

Plaintiff Begala contends that he asserted the National Bank Act claim in Case Number C-1-97-74 but that the Court declined to consider the merits of the claim. On the basis of that contention, Plaintiff Begala contends that the doctrine of res judicata is inapplicable to his federal claims in this action. See Cromwell v. County of Sac, 94 U.S. 351, 352 (1877) (party is not barred from assertion of a claim that was offered but not resolved in an earlier action). Plaintiff Begala's argument is specious.

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[1] Plaintiff Begala has argued that this Court's decision in Case Number C-1-97-74 was not a decision on the merits, inasmuch as the Court dismissed his state law claims pursuant to Rule 12(b) (1). Plaintiff's assertion is specious. The Court dismissed Plaintiff Begala's Truth-in-Lending Act claim on the merits.

Plaintiff Begala contends that his usury claim in Case Number C-1-97-74 was, in effect, a claim that Defendant had violated the National Bank Act by charging interest in excess of the legal limit. In fact, Plaintiff Begala did not invoke the National Bank Act as a basis for his usury claim or as a basis for this Court's subject matter jurisdiction in Case Number C-1-97-74. Rather, he stated in the preamble to his complaint in that action that his claims were based upon the Truth-in-Lending Act and the common law of Ohio. See Complaint, Case Number C-1-97-74, ¶1. He made the following allegations with respect to the usury claim in the body of his complaint:

> 81. The principal sums that PNC lent to plaintiffs were repayable by plaintiffs.
>
> 82. By imposing the "EXTENSION FEES" and/or undisclosed interest upon plaintiffs who opted to postpone loan payments under the payment holiday program, PNC exacted from plaintiffs greater profit in the form of interest than is permitted under state law.

Complaint, Case Number C-1-97-74. Plaintiff Begala's claim was clearly based upon state law and not upon the National Bank Act.

Plaintiff Begala argues that "Mr. Begala tried to assert his usury claim in the earlier action, but the Court decided not to consider whether or not the claim arose under federal law." Memorandum in opposition, p. 5. As the Court has [sic] observes, Plaintiff Begala's argument is disingenuous. He did

not try to assert a usury claim under federal law. He unambiguously asserted a usury claim under Ohio common law, and the Court declined to retain jurisdiction over that claim after it had dismissed the only claim Plaintiff Begala asserted under federal law, the Truth-in-Lending Act claim.

Plaintiff Begala has not argued that he could not have asserted a claim under the National Bank Act in Case Number C-1-97-74. Indeed, he fallaciously argues that he did attempt to assert such a claim. Accordingly, the third element of the res judicata standard set forth above is satisfied with respect to that claim, and the Court concludes that Plaintiff is precluded from asserting the claim in accordance with the res judicata doctrine. See Sanders, 973 F.2d at 483 (the third element is satisfied when the party could have asserted the claim in the prior action). Defendant's motion to dismiss that claim is well-taken.

Plaintiff Begala contends that the fourth element of the res judicata standard is not satisfied with respect to his RICO claim, inasmuch as he could not have asserted that claim in Case Number C-1-97-74. Plaintiff Begala contends that the RICO claim is not based upon the same allegations as supported the Truth-in-Lending Act claim in Case Number C-1-97-74, and that, in order to properly assert a RICO claim, he would have been required to assert facts in much greater detail than was required to support any of the claims asserted in the earlier action. Memorandum in opposition, p. 9.

"Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" Sanders, 973 F.2d at 484 (quoting Westwood Chemical Co., 656 F.2d at 1227). Where the

claims in the second action are based upon allegations of the "same behavior" as is alleged to support the claims in the first action, an identity of causes of action exists. Id.

Plaintiff Begala's RICO claim is based upon allegations that Defendant offered him payment holidays without disclosing the consequences of his acceptance of the offers. That alleged behavior by Defendant was also the basis for Plaintiff Begala's Truth-in-Lending Act claim. While Plaintiff Begala correctly argues that the elements of the RICO claim and the elements of the Truth-in-Lending Act claim are different, he is incorrect in his assertion that the differences in those elements renders the res judicata doctrine inapplicable to the RICO claim.

Plaintiff Begala has not advanced a compelling justification for his failure to assert the RICO claim in Case Number C-1-97-74. He could have brought that claim in the earlier action but failed to do so. Accordingly, the claim is subject to dismissal pursuant to the res judicata doctrine. See Sanders, supra. See also In re Justice Oaks II, Ltd., 898 F.2d 1544, 1551 (11th Cir.) (identity of causes of action requires that claims arise from the same transaction or occurrence or core of operative facts) (cited with approval in In re Micro-Time Management Systems, Inc., Nos. 91-2260, 91-2261, 1993 WL 7524 at **5 (6th Cir. January 12, 1993), cert. denied, 510 U.S. 906 (1997)), cert. denied, 498 U.S, 959 (1990).

Plaintiff Begala raises two arguments with respect to the res judicata doctrine that are not based specifically upon the elements of res judicata as set forth above. First, he contends that the doctrine of res judicata is not an appropriate

basis for the dismissal of claims pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Second, he contends that the Court ought not to dismiss claims on the basis of res judicata in light of the pendency of Plaintiff's appeal of the judgment in Case Number C-1-97-74.

Plaintiff's first contention has no merit. The United States Court of Appeals for the Sixth circuit has repeatedly affirmed the dismissal of claims pursuant to Rule 12(b) (6) on the basis of the res judicata doctrine when the district courts have correctly concluded that the doctrine applies. See, e.g., Phipps v. Lewis, No. 97-5194, 1997 WL 809898 (6th Cir. December 16, 1997); Jarrell v. United States, No. 96-3451, 1997 WL 58672 (6th Cir. February 11, 1997); Plassman v. Wauseon, No. 95-3736, 1996 WL 254662 (6th Cir. May 14, 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 513 (1996); Kane v. Magna Mixer Co., 71 F.3d 555 (6th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1848 (1996); Hanner v. Stone, No. 92-2565, 1993 WL 302206 (6th Cir. August 6, 1993); Jackson v. Pline, No. 92-1172, 1992 WL 203760 (6th Cir. August 20, 1992) ; Sanders, supra; Guzowski v. Hartman, 969 F.2d 211 (6th Cir. 1992), cert. denied, 506 U.S. 1053 (1993).

Plaintiff Begala's remaining argument, based upon the pendency of his appeal from the judgment in Case Number C-1-97-74, is equally unavailing. A decision is not deprived of its preclusive effect while on appeal. See Smith v. Securities and Exchange Commission, 129 F.3d 356, 363 n.7 (6th Cir. 1997); Commodities Export Co. v. U.S. Customs Service, 957 F.2d 223, 228 (6th Cir.), cert. denied, 506 U.S. 831 (1992).

For the reasons set forth above, the Court concludes that Plaintiff Begala's National Bank Act and RICO claims are barred by the doctrine of res judicata. Accordingly, Defendant's motion to dismiss those claims (Doc. 4) is hereby **GRANTED**.

b. Plaintiffs Borchers' and Edwards' Truth-in-Lending Act Claims

In its Memorandum and Order dismissing Plaintiff Begala's Truth-in-Lending Act claim in Case Number C-1-97-74, this Court set forth its reasons for concluding that Plaintiff Begala had not stated a claim upon which relief could be granted. The Court analyzed the claim as follows:

> The obligation to make the disclosures required by the Truth-in-Lending Act arises before the credit transaction is consummated. See Rudisell v. Fifth Third Bank, 62 F.2d 243, 246 (6th Cir. 1980); 12 C.F.R. §226.17(b). In a closed-end credit transaction, such as the transaction in question[2], an obligation to make new disclosures after the consummation of the transaction arises only in three situations. See 15 C.F.R. §226.17(e).[3]

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[2] In a footnote, the court cited 12 C.F.R. §226.2(10) and (20).

[3] In a footnote, the Court noted that 12 C.F.R. §226.17(e) provides as follows:

> Effect of subsequent events. If a disclosure

> Plaintiff has alleged, and the Court must accept as true for the purpose of resolving the instant motion, that the finance charge term disclosure became inaccurate, post-consummation, as a result of Plaintiff's exercise of his payment holiday options. The applicable regulation, 12 C.F.R. §226.17(e), provides, however, that the inaccuracy thus created does not constitute a violation of law. Accordingly, Plaintiff's claim, if any, must be based, not upon the inaccuracy of the old disclosure, but upon a failure by Defendant to make new disclosures. New disclosures are required only as provided in 12 C.F.R. §226.17(f), §226.19, or §226.20.
>
> None of those sections of the regulation required Defendant to make new disclosures when offering a payment holiday to Plaintiff. Paragraph (f) of §226.17 applies when disclosures become inaccurate before consummation.[4] Section 226.19 applies only

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> becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of this regulation, although new disclosures may be required under paragraph (f) of this section, §226.19, or §226.20.

[4] In a footnote, the Court noted that 12 C.F.R. §226.17(f) provides, in pertinent part, as follows:

> Early disclosures. If disclosures required by this

to certain residential mortgage and variable-rate transactions, neither of which describes the transaction consummated by Plaintiff and Defendant's predecessor.

Section 226.20 applies to refinancings, assumptions, and variable-rate adjustments. Plaintiff does not contend that the transaction in question was an assumption or a variable-rate adjustment. The Court concludes that the transaction was also not a refinancing, which is defined by the regulation as the satisfaction of an existing obliqation and its replacement by a new obligation. 12 C.F.R. §226.20(a). Plaintiff does not allege that his original obligation to Defendant was satisfied each time he exercised the payment holiday option. Rather, Plaintiff elected to extend the repayment period of the existing obligation without satisfying it. Accordingly, the exercise of a payment holiday option did not constitute a refinancing and did not trigger a disclosure requirement pursuant to 12 C.F.R, §226.17(e).

The Court's analysis to this point is consistent with the Official Staff Commentary to 12

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subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose [the following] before consummation. . . .

C.F.R. §226.20(a). The Commentary suggests that a change in the terms of an existing obligation, "such as deferral of individual installments," does not constitute a refinancing unless it is "accomplished by the cancellation of that obligation and the substitution of a new obligation."

The United States Supreme Court has concluded that the regulations adopted pursuant to the Truth-in-Lending Act and the Official Staff Commentary to those regulations are entitled to particular deference, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-66 (1980). In this instance, deference is appropriate in light of the rationality of the regulations and commentary in light of the Act's primary applicability to events prior to consummation of a credit transaction. See, e.g., Rudisell, 622 F.2d at 246 (the purpose of the disclosure requirements is to permit the borrower to perform comparative shopping for credit terms before consummation of a transaction).

Having concluded that Defendant was not obligated by virtue of the applicable regulations to make new disclosures each time it offered Plaintiff a payment holiday, the Court must consider Plaintiff's argument that an obligation to make new disclosures arose under the provisions of the Truth-in-Lending Act itself, notwithstanding the regulations.

Plaintiff contends that 15 U.S.C. §1602(d), (e), (f), and (h), together with 15 U.S.C. §1638(a) (3) and (b) (1), imposed upon Defendant an obligation to make new disclosures each time it offered him a payment holiday option. The Court is not persuaded.

The cited subsections of 15 U.S.C. §1602 are definitional. In the context of Plaintiff's claim, they establish only that Plaintiff and Defendant are persons, that Defendant extended credit to Plaintiff, that Defendant is a creditor, and that Plaintiff is a consumer. Subsection (a) (3) of 15 U.S.C. §1638 establishes, in the context of Plaintiff's claim, that Defendant was obligated to disclose the finance charge in connection with the transaction. The final statutory provision cited by Plaintiff is 15 U.S.C. §1638(b) (1), which provides, in pertinent part, that "the disclosures required . . . shall be made before the credit is extended." The Court does not perceive in that language a basis for a claim based upon Defendant's failures to make new disclosures when it offered the payment holiday options to Plaintiff.

Plaintiff also refers to various regulations, in addition to those cited above, for the proposition that Defendant was required to make new disclosures. Those provisions, however, do nothing more than establish the nature of the disclosures to be made, when

> disclosures are required, and provide a specific definition of the term, "finance charge," as used in the regulations. See 12 C.F.R. §§226.4 and 226.18. None of the regulations cited by Plaintiff suggests that Defendant was obligated to make new disclosures when it offered a payment holiday option to Plaintiff.
>
> The Court concludes, on the basis of the foregoing analysis of the statutes in question and the applicable regulations, that Defendant was obligated to make disclosures only prior to the consummation of the original transaction in question. Liability under the Truth-in-Lending Act may not be established on the basis of Defendant's failure to make new disclosures when it offered a payment holiday option to Plaintiff. Plaintiff has not, therefore, stated a claim for relief under the Truth-in-Lending Act upon which relief may be granted.

Case Number C-1-97-74, Memorandum and Order (July 30, 1997).

The Court's analysis in that Memorandum and Order applies equally to Plaintiffs Borchers' and Edwards' Truth-in-Lending Act claims, which are the same in all material respects as Plaintiff Begala's claim. The Court concludes that Defendant's motion to dismiss Plaintiffs Borchers' and Edwards' Truth-in-Lending Act claims is well-taken.

c. Plaintiffs Borchers' and Edwards' National Bank Act Claim

Plaintiffs Borchers and Edwards allege that Defendant violated the National Bank Act, 12 U.S.C. §§85 and 86, by virtue of the payment holiday program. Section 85 of the National Bank Act provides that Defendant may not charge interest in excess of "the rate allowed by the laws of the State" of Ohio. Section 86 provides that a consumer who proves that a lender has violated §85 may recover "twice the amount of interest" paid. The parties agree that the extension fees paid by Plaintiffs and the additional interest resulting from the payment holidays are interest for purposes of the National Bank Act. See Smiley v. Citibank, 517 U.S. 735, 116 S.Ct. 1730, 1735-36 (1996). The parties also agree that the Court must refer to Ohio law to determine the rate of interest that Defendant may legally charge.

In applying 12 U.S.C. §85, the United States Court of Appeals for the Sixth Circuit has reasoned as follows:

> This statute has been interpreted by the Supreme Court, under the Most Favored Lender Doctrine, to allow [national] banks to charge the rate allowed to the "most favored lenders" under state law. Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 314 n. 26 . . . (1978) (citing 12 C.F.R. § 7.7310).
>
> Consequently, the maximum interest rate allowed to banks under Ohio law determines whether the Bank in this case has charged

> excessive interest. The Ohio Revised Code allows "building and loan" banks as well as savings banks to charge unlimited dues, fines, interest and premiums on "loans made." Ohio Rev. Code Ann. §§ 1151.21, 1161.28 (Baldwin 1994).
>
> * * *
>
> Consequently, these contracts are governed by the Most Favored Lender Doctrine, and there is no limit on the amount of interest the Bank could charge.

Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 393-94 (6th Cir. 1996) .

Plaintiffs recognize the applicability of the Kenty decision but contend that it does not dispose of all of the issues raised by Plaintiffs' National Bank Act claims. Specifically, they contend that Kenty does not answer the following question: Does the Most Favored Lender Doctrine permit national banks to charge the interest rate allowed to the most favored lender under state law if the national bank does not conform to all of the limitations set forth in the state law that sets that rate?

Plaintiffs observe that Ohio Revised Code ("O.R.C.") §§1151.21 and 1161.28 provide that a building and loan association or savings bank may charge whatever rate of interest is "provided for in its constitution and bylaws." Those statutes further provide that the rate of interest charged by a building and loan association or a savings bank "shall not

be deemed usury, although in excess of the legal rate of interest." Plaintiffs contend that, in accordance with the Most Favored Lender Doctrine, Defendant may only charge that rate of interest that is "provided for in its constitution and bylaws." Accordingly, Plaintiffs contend that Defendant may only charge unlimited interest if its constitution and bylaws permit it to do so. Defendant argues that the "constitution and bylaws" language is irrelevant to the application of the Most Favored Lender Doctrine and that the National Bank Act permits Defendant to charge unlimited interest because the most favored lenders under Ohio law are permitted to do so.

Plaintiffs do not cite the text of the National Bank Act for their contention that a national bank is subject to the "constitution and bylaws" requirement applicable to the State of Ohio's most favored lenders. Rather, Plaintiffs cite two appellate court cases, one from this Circuit and one from the Eighth Circuit, and a provision of the Code of Federal Regulations.

None of the authorities cited by Plaintiffs stands for the proposition that Defendant's ability to charge unlimited interest is restrained by its constitution and bylaws. The first appellate decision, First National Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975), stands for the proposition that a national bank may not rely upon the statutory rate of interest allowed to a state's most favored lender when that state's case law establishes that a lower rate may actually apply to that lender. The United States Court of Appeals for the Eighth Circuit held as follows:

> We think that determination of the "rate allowed by the laws of the State" can only be

> accomplished with reference to state court interpretations of the state's own constitution and statutes. The primary principle of construction of 12 U.S.C. §85 . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the statute.

Id.

While decisions of the Arkansas state courts had modified or clarified the maximum rate of interest permitted by the state statutes at issue in Nowlin, Plaintiffs in this case have not argued that the courts of Ohio have held that the Ohio Revised code does not permit building and loan associations and savings banks to charge unlimited interest. Accordingly, while the Nowlin court may well have been correct in holding that application of 12 U.S.C. §85 required reference to state case law interpreting the relevant state statutes, Plaintiffs have not identified any decision by a court of Ohio in which the unlimited interest provisions of O.R.C. §§1151.21 and 1161.28 are modified or clarified. Accordingly, the court is not persuaded by the Nowlin decision that Defendant was not entitled to charge Plaintiffs unlimited interest.

The second appellate court decision cited by Plaintiffs is Northway Lanes v. Hackley Union Nat'l Bank and Trust Co., 464 F.2d 855 (6th Cir. 1972). There, the United States Court of Appeals for the Sixth Circuit held that

> [t]he legislative history of Section 85 . . . requires the conclusion that national banks may charge as much interest as savings and loan associations are allowed to charge on equivalent transactions by Michigan law.

Id. at 862. That holding does not support Plaintiffs' contention that Defendant may only charge unlimited interest if its constitution and bylaws permit it to do so. Nothing else in the Northway Lanes decision supports Plaintiffs' contention.

Finally, Plaintiffs cite 12 C.F.R. §7.4001(b), which provides as follows:

> A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If the state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

That regulation does not support Plaintiffs' contention. Indeed, the regulation provides explicitly that a national bank

is subject, with regard to any class of loans, only to the state law limitations on the interest rate the state's most favored lender may charge on loans of that class. The regulation is silent with regard to the "constitution and bylaws" language of the Ohio Revised Code.

While the cited regulation, 12 C.F.R. §7.4001(b), does not support Plaintiffs' contention, the Court is persuaded that the regulation lends support to the contrary position. The regulation states, as an example, that a national bank may charge the rate of interest allowed to a licensed small loan company "without being so licensed." The Court is persuaded that the fact that a national bank, without being licensed, may charge the rate of interest allowed to a licensed institution suggests that a national bank may also charge the unlimited interest allowed to certain state institutions whose constitutions and bylaws permit, without adopting a constitution and bylaws that permit it to charge unlimited interest.

The Court finds no legal support for Plaintiffs' contention that Defendant may not charge unlimited interest. The applicable law provides that Defendant may charge the rate allowed to building and loan associations and savings banks in Ohio. Ohio law permits such institutions to charge unlimited interest. Defendant may, therefore, charge unlimited interest and does not violate 12 U.S.C. §85 by doing so. Accordingly, Defendant's motion to dismiss

Plaintiffs Borchers' and Edwards' National Bank Act claims is well-taken.[5]

d. Plaintiffs Borchers' and Edwards' RICO Claim

Plaintiffs Borchers' and Edwards' final claim under federal law is that Defendant violated RICO, 18 U.S.C. §1962(c), by engaging in a pattern of racketeering activity and the collection of unlawful debts. Plaintiffs allege, specifically, as follows:

> 94. At all times relevant to this complaint, Defendant PNC Bank, Ohio, N.A., in conjunction with The Central Trust Company, National Association, The Central Bancorporation, Inc., PNC Financial Corp., New Financial Corp., PNC Bank corp., its various affiliated entities, agencies, accountants, legal counsel, dealers, and John Doe(s) (hereinafter the "Enterprise"), was an association-in-fact "enterprise" as that term is defined in 28 U.S.C. § 1961(4), engaged in and affecting interstate commerce. The enterprise was and is engaged in legitimate

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[5] For the reasons set forth in this section of this Memorandum and Order, Plaintiff Begala's National Bank Act claim would be subject to dismissal even if Plaintiff Begala were not precluded, pursuant to the res judicata doctrine, from asserting that claim in this action.

banking activities, in addition to the pattern of racketeering activity and collection of unlawful debt described below. In addition to defendant, the other entities and persons comprising the enterprise facilitated the racketeering activity by, inter alia, creating and/or participating in the creation of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays, as alleged herein; communicating, and/or participating in the communication of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays, as alleged herein; disseminating and transmitting, and/or participating in the dissemination and transmission of, false, inaccurate, misleading, and deceptive payment holiday solicitation letters and other information related to payment holidays; demanding, communicating, collecting, and/or attempting to collect fraudulent and unlawful charges related to payment holidays; and interfering with credit and other financial opportunities of customers who refused to pay charges related to or resulting from payment holidays.

Amended Complaint. Plaintiffs further allege that "[t]he pattern of racketeering engaged in by PNC involves schemes and artifices to defraud constituting mail fraud (18 U.S.C. §1341) and wire fraud (18 U.S.C. § 1343), which are 'racketeering activity' as defined in 18 U.S.C. § 1961(1) (B)." Amended Complaint, ¶97.

"A violation of RICO under 18 U.S.C. §1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Kenty, 92 F.3d at 389 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)). Defendant contends that Plaintiffs' allegations do not satisfy the second requirement of the RICO claim, inasmuch as Plaintiffs have alleged conduct only of Defendant and not of an "enterprise."

The United States Court of Appeals for the Sixth circuit has concluded that the language of 18 U.S.C. "precludes the 'person' conducting or participating in the enterprise's affairs from simultaneously serving as the "enterprise." See Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1489 (6th Cir. 1989). Rather, that court has held, that section "requires separate legal entities as the 'person' and the 'enterprise.'" Id. Accordingly, "a corporation cannot be named as the liable 'person' and simultaneously fulfill the 'enterprise' requirement as well." Id.

Defendant contends that Plaintiffs have not alleged the existence of an enterprise in satisfaction of the second requirement of the RICO claim inasmuch as the entities they have named are all subdivisions, agencies, or predecessors of Defendant. See Amended Complaint, ¶94. Indeed, in accordance with the distinctness requirement applicable to

claims under 18 U.S.C. §1962(c), "a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members." Davis v. Mutual Life Insurance Co. of New York, 6 F.3d 367, 377 (6th Cir. 1993), cert. denied, 510 U.S. 1193 (1994). "An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself." Id. (citing United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983)).

While Plaintiffs argued strenuously in opposition to other arguments by Defendant regarding the RICO claim in their memorandum in opposition to the motion for summary judgment, they were silent with regard to the distinctness requirement. In a motion to supplement their opposition to the motion for summary judgment (Doc. 20), which is hereby **GRANTED**, they do not dispute Defendant's contention that the entities alleged to comprise the enterprise are all subdivisions or agents of Defendant or its predecessor in interest. They do not contend that any other entity was a part of the enterprise. Indeed, the allegations of the complaint regarding the activities of the alleged members of the enterprise make clear that all of the members acted as agencies of Defendant.[6] While Plaintiffs have not expressly

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[6] Plaintiffs allege that the members of the enterprise

> facilitated the racketeering activity by, inter alia, creating and/or participating in the creation of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays . . . communicating, and/or

confirmed that all of the alleged members of the enterprise are actually Defendant's subdivisions and agents or those of its predecessor, the Court is convinced by Plaintiffs' silence on the issue and by the allegations of the Amended Complaint, that Plaintiffs allegations do not satisfy the "enterprise" element of the RICO claim. If Plaintiffs had believed that any participant in the enterprise was not a subdivision or agent of Defendant or its predecessor, the onus would have been upon them, in response to Defendant's motion to dismiss, to clarify their allegations. They would simply have identified an entity that was not a subdivision or agent of Defendant or its predecessor and discussed its alleged role in the enterprise.

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> participating in the communication of, false, inaccurate, misleading, and deceptive representations and information concerning payment holidays, as alleged herein; disseminating and transmitting, and/or participating in the dissemination and transmission of, false, inaccurate, misleading, and deceptive payment holiday solicitation letters and other information related to payment holidays; demanding, communicating, collecting, and/or attempting to collect fraudulent and unlawful charges related to payment holidays; and interfering with credit and other financial opportunities of customers who refused to pay charges related to or resulting from payment holidays.

Amended Complaint, ¶94.

The alleged activities of the members of the enterprise are strikingly similar to the alleged activities of Defendant as described in the 24 preceding pages of the Amended Complaint.

Defendant's motion to dismiss the RICO claims of Plaintiffs Borchers and Edwards is well-taken.[7]

e. The State Law Claims

Having concluded that Defendant's motion to dismiss all of Plaintiffs' claims based upon federal law is well-taken, the Court declines to exercise supplemental jurisdiction over their remaining state law claims.

4. Conclusion

For the foregoing reasons, Defendant's motions to dismiss this action (Doc. 4 and Doc. 13) are hereby **GRANTED**. Plaintiffs' claims based upon federal law are **DISMISSED**.

Plaintiffs' claims based upon state law are **DISMISSED WITHOUT PREJUDICE**. This action is **CLOSED**.

**IT IS SO ORDERED.**

/s/_____
Sandra S. Beckwith
United States District Judge

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[7] For the same reasons, Plaintiff Begala's RICO claim would be subject to dismissal, even were the claim not barred pursuant to the res judicata doctrine.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

[Filed March 6, 1998]

No. C-1-97-717

| | |
|---|---|
| John A. Begala, et al., | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| PNC Bank, Ohio, National | ) |
| Association, | ) |
| *Defendant*. | ) |
| | ) |

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT DEFENDANT'S MOTIONS TO DISMISS [DOCS. 4 AND 13] ARE **GRANTED**.

March 6, 1998

/s/_____
Kenneth Murphy, Clerk
Deputy Clerk

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed August 25, 2000]

No. 98-3360, 99-3652

JOHN A. BEGALA, ET AL.
*Plaintiffs-Appellants,*

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,
*Defendant-Appellee.*

### ORDER

**BEFORE:** WELLFORD, BATCHELDER, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members, but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/_____

**Leonard Green, Clerk**